



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-245856.2

February 7, 1992

Mr. Terrence O'Donnell
General Counsel
Department of Defense

Dear Mr. O'Donnell:

Our Office is reviewing the Department of Defense (DoD) implementation of the amendment made by Pub. L. No. 101-510, § 1405, 104 Stat. 1675 (1990), to the account closing statutes (31 U.S.C.A. §§ 1551-1557 (West Supp. 1991)). DoD has issued new guidance on the appropriation to be obligated for contract changes occurring after the appropriation which funded the original contract has expired. We are requesting an explanation of DoD's legal basis for the new guidance.

Various decisions by this Office have discussed the rules for determining whether agencies should obligate current or expired appropriations for contract changes occurring after the appropriation initially obligated by the contract expired and therefore was no longer available for incurring new obligations. A contract change which exceeded the general scope of the original contract, commonly referred to as an outside-the-scope change, was considered a new obligation. An outside-the-scope change, like any new obligation, was chargeable to funds current at the time the change was made. 37 Comp. Gen. 861 (1958); B-207433, Sept. 16, 1983. See also 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, Aug. 2, 1983; B-224702, Aug. 5, 1987.

In contrast, a contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, was considered attributable to an antecedent liability. In other words, the original contract made the government liable for a price increase under specified conditions and the subsequent contract change made that liability fixed and certain. Therefore, the liability related back to the original contract and the price increase to pay the liability was charged to the appropriation initially obligated by the contract. 59 Comp. Gen. 518 (1980); 44 Comp. Gen. 399 (1965); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938). These rules for obligating contract changes are based on the requirements of 31 U.S.C. §§ 1502(a), 1341(a)(1) (B), and are discussed in the

decisions cited. See also, 61 Comp. Gen. 184 (1981); 55 Comp. Gen. 768 (1976).

The account closing statutes in effect prior to the 1990 amendments (31 U.S.C. §§ 1551-1557 (1988)) provided for the obligated balance of an appropriation to retain its fiscal year identity for two years after the appropriation expired, after which the expired account was transferred to a successor account and merged with other expired accounts for the same general purpose. These successor accounts were known as "M" accounts. Within-the-scope changes occurring within two years of the appropriation's expiration were therefore obligated against the expired account using surplus authority, *i.e.*, unobligated funds from the expired appropriation. Within-the-scope changes occurring more than two years after the appropriation's expiration were obligated in the "M" account using funds restored from the merged surplus account, *i.e.*, unobligated balances of expired accounts which after two years were transferred to merged accounts and lost their fiscal year identity. However, concern over the large amounts that had accumulated in the merged surplus accounts that permitted changes to exceed the amounts originally available for programs led to the 1990 amendments eliminating the merged surplus accounts.

The 1990 amendments to the account closing statutes extended the expired account to five years at which point the account is closed. Adjustments to obligations properly chargeable to the original appropriation are to be charged to the expired account during the five year period. 31 U.S.C.A. § 1553(a). Once the account closes, obligations chargeable to the original appropriation are chargeable against current appropriations available for the same purpose. However, charges to current appropriations may not exceed one percent of the current appropriation or the unexpended balance of the original appropriation. 31 U.S.C.A. § 1553(b). In addition, the 1990 amendments imposed approval and reporting requirements for certain contract changes that result in adjustments to expired accounts. 31 U.S.C.A. § 1553(c).

The "Revised DoD Guidance on Accounting for Expired Accounts, Including 'M' and Merged Surplus Accounts" para. 4, dated June 13, 1991, issued by the Comptroller of the Department of Defense, departs from the procedures discussed above by requiring that within-the-scope contract changes, as well as those outside-the-scope, be charged against current appropriations. See particularly para. 4a & b. The Comptroller of the Department of Defense also issued related guidance in a memorandum on "Contract Defaults Resulting in Reprocurement Contract Actions" on January 27, 1992. The memorandum states that replacement contracts may be funded from expired accounts if certain conditions are met, including the replacement contract being

substantially of the same size and scope as the original contract. The January 12, 1992 memorandum is consistent with the historical rules for obligating replacement contracts and reversed an August 12, 1991 memorandum from the Deputy Comptroller (Management Systems) which stated that current year appropriations and not expired accounts are to be used for replacement contracts.

DoD's guidance appears to us to be a marked departure from the historical rules for obligating contract changes. Therefore, we are requesting DoD's analysis of the legal basis for its guidance. Please include in your analysis responses to the following specific questions:

- (1) Does DOD agree that the guidance departs from the historical rules for obligating contract changes? If not, please explain why not?
- (2) What provision of section 1405, Public Law 101-510, or any other law, authorizes DoD to change the historical rules for determining what appropriation to charge for within-the-scope contract changes?
- (3) How can the DoD guidance requiring that all contract changes be obligated against current appropriations be reconciled with the specific statutory scheme established in Public Law 101-510 (31 U.S.C. § 1553(c)) for approving and reporting obligations for contract changes against expired accounts?
- (4) What is the legal basis for distinguishing for purposes of section 1405 between within-the-scope contract changes and replacement contracts "substantially of the same size and scope as the original contract"?

Please provide your response within 30 days so that we may consider your views during our review. Should you have any questions, please contact Richard T. Cambosos of my staff on 275-5644.

Sincerely yours,


 Gary L. Kepplinger
 Associate General Counsel

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